

October 31, 2018

Michael H. Pryor  
Attorney at Law  
202.383.4706 tel  
202.296.7009 fax  
m Pryor@bhfs.com

**VIA ECFS**

Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE: **Notice of Ex Parte Presentation**, In the Matter of *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision*, Docket No. 18-152

Dear Ms. Dortch:

On Tuesday, October 30, 2018, Holly Borgmann, Head of Government Affairs for ADT LLC d/b/a ADT Security Services ("ADT"), Dan McGrath, Chief Litigation Counsel- Chief Compliance Officer for ADT, and the undersigned held a series of separate meetings with the following individuals:

Zenji Nakazawa, Public Safety and Consumer Protection Legal Advisor for Chairman Ajit Pai.

Arielle Roth, Wireline Legal Advisor for Commissioner Michael O'Rielly, and Kagen Despain, with Commissioner Michael O'Rielly's office.

Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Jessica Rosenworcel.

Jamie Susskind, Chief of Staff to Commissioner Brenden Carr.

Mark Stone, Deputy Bureau Chief of the Consumer and Governmental Affairs Bureau; Kurt Schroeder, Chief of the Consumer Policy Division; Karen Schroeder, Attorney Advisor of the Consumer Policy Division; Christina Clearwater, Staff Attorney for the

Consumer and Governmental Affairs Bureau; and Kristi Thornton of the Consumer and Governmental Affairs Bureau.

During these meetings, ADT discussed the issues and matters contained in the attached presentation. We described the nature of the informational and other types of calls that ADT routinely makes and ADT's extensive compliance program, as well as the litigation impact resulting from the ambiguity regarding the definition of an automatic telephone dialing system. The attached presentation and our discussions were consistent with ADT's previous filings in this proceeding.<sup>1</sup>

The *Marks* decision is unreasoned and will embolden plaintiffs' firms to become even more aggressive in pursuit of legitimate business seeking to communicate with their customers. In fact, 25 separate new TCPA cases were just filed in a single day and one of the major TCPA plaintiffs' firms announced plans to initiate 80 to 100 new cases within the next month.<sup>2</sup> The Commission should act quickly to stem this new wave of litigation spurred by *Marks* and confirm that equipment does not qualify as ATDS if it does not have the present capacity to randomly or sequentially generate telephone numbers to be called.

Please contact the undersigned if you have any questions.

Sincerely,

cc: Zenji Nakazawa (via email)  
Arielle Roth (via email)  
Amy Bender (via email)  
Travis Litman (via email)  
Jamie Susskind (via email)  
Mark Stone (via email)  
Kurt Schroeder (via email)

/s/ Michael H. Pryor  
Michael H. Pryor  
Brownstein, Hyatt, Farber, Schreck,  
LLP  
1155 F Street NW, Suite 1200  
Washington, DC 20004  
Telephone: (202) 383-4706

17706941

---

<sup>1</sup> See, e.g., *Comments of ADT LLC d/b/a ADT Security Services*, CG Docket Nos. 18-152, 02-278 (filed October 17, 2018) ("*ADT October 17th Comments*"); *Comments of ADT LLC d/b/a ADT Security Services*, CG Docket Nos. 18-152, 02-278 (filed June 13, 2018) ("*ADT June 13<sup>th</sup> Comments*").

<sup>2</sup> See, Eric J. Troutman, *Happy Halloween TCPAland!: TCPA Class Actions Up 21% YTD And More Ghoulish TCPA Statistics to Freak You Out*, TCPAland, (Oct. 31, 2018) <https://tcpaland.com/happy-halloween-tcpaland-more-ghoulish-tcpa-statistics-to-freak-you-out/> .



# TCPA Reforms In Light of *ACA International* and *Marks*

*HOLLY BORGMANN, ADT*

*DAN MCGRATH, ADT*

*MICHAEL PRYOR, BROWNSTEIN HYATT FABER  
SCHRECK*

*10/30/18*

## ADT Overview

ADT is the nation's largest alarm monitoring and smart home service provider with over 7 million customers

- ADT provides a variety of services, including telehealth, utilizing cutting edge technologies

ADT's business is ultimately about protecting public safety

ADT engages in substantial and varied communications with its customers

- Alarm verification calls
- Informational calls such as appointment reminders, system updates (e.g., low battery), or malfunctions (loss of communication with alarm panels)
- Transactional calls regarding account status, past due amounts
- Telemarketing
- Millions of contacts each month, primarily informational
- Volume of contacts requires use of efficient calling technologies



## ADT Compliance

ADT has invested tens of millions of dollars to develop policies and practices to ensure compliance with TCPA, the Telemarketing Sales Rules, and state and local laws

- Annual compliance spending exceeds \$2 million

No calling unless appropriate consent has been obtained and recorded

- ADT and its third-party compliance vendors continually scrub calling lists against up-to-date databases
- Maintains internal do not call lists that are recorded in real-time, updated within 24 hours and shared with vendors

Utilizes calling platforms (LiveVox's Human Call Initiator (HCI) and Avaya Proactive Contract 5.1 (APC 5.1)) that do not qualify as ATDS

- Numerous courts have found these systems are not ATDS due to the degree of human intervention
- No capacity to generate random or sequential numbers

ADT queries available databases for reassigned numbers

Extensive oversight of third-party telemarketing vendors, including strict telemarketing guidelines



## Experience with Litigation

ADT's substantial compliance efforts have reduced some litigation

- Virtually no claims for informational or telemarketing calls in the past two years

But – ADT has recently been named a defendant in a number of individual and putative class actions for lawful calls regarding past due amounts

- Plaintiffs wrongly allege use of ATDS, lack of consent, or inadvertent calls to wrong or reassigned numbers (despite use of available databases)
- Often settled for nuisance value

As the record reflects, ADT's experience is far from unique

- TCPA suits involving legitimate business contacts have grown dramatically

## **Exempt Informational & Transactional Calls**

ADT welcomes efforts to revise TCPA in light of ACA but respectfully suggests that the time has come to equalize treatment of residential and cell phones, which have largely replaced residential land line phones as the primary method of communication

Congress/FCC exempted non-telemarketing calls, including debt collection calls to residential lines, even when those lines were the only form of mass communication

- Legislative History shows Congress never intended to regulate debt collection calls
- 1995 TCPA Recon Order used debt collection calls from lists as prime example of equipment that is NOT ATDS

Commission has authority to exempt non-telemarketing calls – various paths

- Exempt “free” to end use cell phone calls
- Extend the established business relationship exemption to non-telemarketing cell phone calls

Exemption can be coupled with reasonable limits on call frequency and opt out requirements

## Definition of an ATDS

To qualify as an ATDS, equipment must itself have the present capacity to generate random and sequential numbers, and to dial such numbers without human intervention. This capacity must be used to make the calls at issue.

The Ninth Circuit reasoning in *Marks* is flawed

- *Marks* ignored plain text and commonly applied rules of textual analysis
  - Random/sequential number generator clause modifies store and produce
  - Equipment at the time the TCPA was enacted stored numbers using random/sequential number generators
- *Marks* misreads legislative history and misapplies statutory context
  - ATDS defined to address specific problem with random/sequential dialing
  - *Marks* ignores separate restriction on prerecorded messages
- *Marks* opens the door to regulating smartphones



## Reassigned Numbers & Revocation

The Commission should define “called party” as the intended recipient

- Consistent with theory of reasonable reliance on prior consent
- Reliance is reasonable absent actual knowledge

The Commission should establish a safe harbor based on documented use of available databases and other reasonable efforts to confirm number status

ADT supports creation of a comprehensive reassigned number database coupled with a safe harbor when used

The Commission should identify reasonable methods for revoking consent

- The Commission should also confirm that consumers may not unilaterally revoke consent when given as bargained-for consideration in a bilateral contract, following *Reyes v. Lincoln Automotive Financial Services*

# Thank You

